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In the Supreme Court of the United States

OCTOBER TERM, 1974

WABASH TRANSFORMER CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 509 F.2d 647. The Board's decision and order (Pet. App. 15a-18a) are reported at 210 NLRB No. 68; the underlying representation decision (Pet. App. 10a-14a) is reported at 205 NLRB 148.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on March 4, 1975. The petition for a writ of certiorari was filed on May 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union's pre-election offer to waive initiation fees and dues for all employees who joined the union before a collective bargaining agreement was executed did not preclude a free choice in the election.

2. Whether the Board properly found that its agent did not engage in conduct which displayed partiality toward the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition.

STATEMENT

A. The Board Proceedings

Pursuant to a petition filed by the Communication Workers of America, AFL-CIO (the Union), a Board-conducted representation election was held among the production and maintenance employees of the Wabash Transformer Corporation's (Company) Farmington, Missouri plant, which the Union won by a vote of 50-43 (Pet. App. 10a). Thereafter, the Company filed objections to the conduct of the election alleging, *inter alia*, that: (1) the Union improperly induced employee support by waiving initiation fees and dues until after a collective bargaining agreement was executed; (2) the Board agent displayed partiality toward the Union by announcing that the polls were open and that the employees could now vote and elect a union representative (A. 28, 41, 43-44).[1]

The Regional Director, based on an administrative investigation, made the following findings and conclusions:

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[1]"A." references are to the printed appendix used in the court below. A copy has been lodged with the Court.

During the election campaign, the Union distributed a leaflet to the employees which read, in part (A. 43):

> Dues $5.50! Yes, your dues will be $5.50—AFTER WE HAVE SUCCESSFULLY BARGAINED A CONTRACT WITH THE WABASH TRANSFORMER CORPORATION—NOT A CENT BEFORE WE REACH AN AGREEMENT! This is a reasonable premium to insure better wages, fringe benefits and working conditions, plus a strong voice to review your grievances with the Company.[2]

In addition, the Union's administrative assistant told employees at a meeting, in response to their questions, that they would not be required to pay either dues or initiation fees until after the Union had been certified and had obtained a collective bargaining agreement with the Company (A. 41). The Regional Director concluded that the Union's promise of deferral of initiation fees and dues for all employees until after certification and consummation of a collective-bargaining agreement did not interfere with the election (A. 43).

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[2]The Union's leaflet was distributed after the Company distributed two leaflets, the second in the employees' paycheck envelopes, which stated, *inter alia*:

> (1) *Now lets discuss union dues*: On this subject the union organizer does give you some facts. He says you are going to have to pay $6.50 per month for men; $6.00 per month for women. That's more than $10,000 a year he's going to extract from your collective pockets. No wonder he's interested in organizing this plant.
>
> (2) IF YOU BELONGED TO THE CWA TODAY THIS PAYCHECK WOULD BE SHORT *$5.50* FOR THIS MONTH'S UNION DUES - - - - - THINK ABOUT IT!!! [A. 42-43.]

The parties agreed that the election would be conducted on March 16, 1973, in two polling sessions, the first from 6:30 a.m. to 7 a.m., and the second from 2:30 p.m. to 5 p.m.[3] The early morning voting period was to accommodate the three anticipated voters on the Company's 11 p.m. to 7 a.m. shift. (A. 44.) On March 16, in accordance with a prior understanding that the Board agent would notify the employees over the plant intercom that the polls were open, Company official Liston, in his office, showed Board agent Van der Horst how to operate the plant intercom. Liston then went into the plant cafeteria which adjoined the office. At approximately 6:30 a.m., according to Liston, the Board agent announced that the polls were opened and that the employees could "now go vote and elect a union representative" (A. 45-46).[4] Liston did not object to the Board agent's announcement, nor did he request that a correction be made prior to the afternoon polling period in which the remaining approximately one hundred employees were to vote. The Regional Director concluded "that while the announcement complained of did not express the purpose of the election in the precise form appearing on the 'Notice of Election', the announcement cannot be interpreted as denoting partiality to the [Union] or as calling for a vote on its behalf" (A. 48).[5]

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[3]The Company operates three shifts - 11 p.m. to 7 a.m., 7 a.m. to 3:30 p.m., and 3:30 p.m. to 11 p.m. There are three employees on the 11 p.m. to 7 a.m. shift (A. 44).

[4]According to the Board agent, the following announcement was made:

> Good morning. I am Tatjana van der Horst of the National Labor Relations Board. You may now vote for your union representative. The polls are open. You may vote if you wish to do so. You do not have to vote if you do not want to [A. 46].

The Director found it unnecessary to resolve this factual dispute, concluding that neither version was prejudicial (A. 48).

[5]The Notice of Election which was posted prominently in the plant stated that:

> This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their Employer * * * [A. 47].

The Board, adopting the Regional Director's recommendation, certified the Union. Regarding the conduct of the Board agent, the Board stated: "While the Board agent may have and should have made explicit what was implicit in the announcement, i.e., that the right to vote for the union necessarily carried with it the right to vote against the union, we do not believe that the agent's statement was *per se* so violative of the Board's standards of neutrality or so prejudicial to the employees' right to cast a negative vote that a new election must be directed" (Pet. App. 12a).[6]

Following certification of the Union, the Company refused to bargain and the Board found that the Company's refusal violated Section 8(a)(5) and (1) of the Act (Pet. App. 18a). The Board rejected the Company's contention that this Court's decision in *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270, required dismissal of the complaint. The Board explained (Pet. App. 17a-18a):

> In *Savair*, the Supreme Court observed that a union could preserve its legitimate interest by the "waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." Here, unlike *Savair*, there was not a waiver limited to those who signed a card for the Union before the election. Rather, in the case before us, the "waiver" extended to all employees, as no employee, whether or not he gave preelection support to the Union, was required to pay initiation fees or dues until after the Union was certified and had a contract with the Employer. We find, therefore, that this was not an improper waiver under the holding of *Savair* and it did not interfere with the election. [Footnotes omitted.]

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[6]Chairman Miller dissented on this point (Pet. App. 13a).

The Board, *inter alia*, ordered the Company to bargain with the Union (Pet. App. 18a; A. 15-16).

B. The Decision of the Court of Appeals

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-6a). The court agreed with the Board's reading of "*Savair* as precluding waivers of fees only when they are offered to employees as an inducement for pre-election support" (Pet. App. 4a-5a). The court further agreed that the Board agent's statement was not "*per se* violative of the Board's standards of neutrality," and "that the circumstances surrounding the statement established that the integrity of the election process was not so impaired as to warrant the ordering of a new election" (Pet. App. 3a).

ARGUMENT

1. In *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270, this Court disapproved a union's offer to waive initiation fees for all employees who signed union authorization cards before a Board election, stating, "[w]e do not believe that the statutory policy of fair elections * * * permits endorsements, whether for or against the union, to be bought and sold in this fashion" (*id.* at 277). However, the Court expressly distinguished the situation here. It recognized that there was a "legitimate" union interest in "waiving the initiation fee when the union has not yet been chosen as a bargaining representative, because '[e]mployees otherwise sympathetic to the union might well have been reluctant to pay out money before the union had done anything for them * * *,'" and added that this interest "can be preserved * * * by waiver of initiation fees available not only to those who have signed up with the union before an election, but also to those who join after the election" (*id.* at 272-274, n. 4). This is what the Union did here.[7]

[7]Moreover, as shown, the Union's waiver offer was not made in connection with card solicitation but to counter Company statements concerning the unwarranted cost of union membership (*supra*, p. 3, n. 2).

2. The additional issue raised in the petition—whether the Board "has discretion to determine that an election is valid where its agent * * * engages in acts admittedly violative of the Board's required neutrality and impartiality" (Pet. 3)—is not presented on this record. For the court of appeals upheld the Board's finding that the agent's statement was not "*per se* violative of the Board's standards of neutrality" (*supra*, p. 6). In any event, the Board did not abuse its discretion concerning the conduct of representation proceedings (*National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331) in determining that, in the circumstances here, the integrity of the election process was not impaired by the agent's statement. As the court below noted (Pet. App. 3a), the announcement was made immediately prior to the early morning opening of the polls (when only three workers were scheduled to vote) and was not repeated when the polls reopened in the afternoon to accommodate the bulk of the voters. Moreover, Company official Liston heard the announcement and made no protest or request for correction at a time when correction easily could have been made.[8]

[8]Contrary to petitioner's contention (Pet. 7-8), the decision here does not conflict with prevailing law in the First and Fifth Circuits, for the cases relied on are factually distinguishable. *National Labor Relations Board* v. *Athbro Precision Engineering Corp.*, 423 F.2d 573 (C.A. 1), upheld a Board decision to require a rerun election where the Board agent during a recess in the voting drank beer with the union representative in a public cafe. And in *Delta Drilling Co.* v. *National Labor Relations Board*, 406 F.2d 109, 113-114, the Fifth Circuit held that the Board's ruling in *Athbro* required a similar result when the Board agent joined the union representative in the latter's motel room during the course of the election. In *National Labor Relations Board* v. *Dobbs Houses, Inc.*, 435 F.2d 704, on the other hand, the Fifth Circuit upheld the Board's determination that the Board agent's statements of support for the union, elicited by questions of the company's election observer, did not taint the election.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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